Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2642–11 OF 2012
ABDUL MALIK ISHAK, AZIAH ALI AND MOHTARUDIN BAKI JJCA
5 MAY 2014

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Contract — Assignment — Notice of assignment — Whether documentary evidence and surrounding circumstances showed existence of assignment — Subcontractor alleged party which engaged it had assigned obligation to pay it balance monies due under subcontract to third party — Whether language used in documentary evidence gave rise to inference of absolute assignment — Whether subject-matter of assignment, parties involved, to whom assignment was made and to whom notice of assignment was to be given all uncertain — Whether subcontractor had no contractual relationship with third party to sue it for payment of monies due under subcontract

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The appellant had engaged a contractor ('IMSB') to provide cleaning services at its dockyard in Lumut, Perak. IMSB subcontracted the job to the respondent. Although it had no contractual relationship with the appellant, the respondent sued the appellant in the High Court for the balance of monies (RM778,975) due to it for cleaning services rendered at the dockyard. The suit was premised on the contention IMSB had assigned to the appellant its right to pay the respondent for work done under the subcontract. The 'assignment' was based upon two letters, P7 and P10. P7 was IMSB's letter to the appellant which stated that 'to facilitate improved commercial arrangements, it would be appreciated if regular monthly payments associated with the cleaning services could be made by PSC-ND on behalf of IMSB directly to DCSB (the respondent) ...' subject to the condition, inter alia, that the payment to the respondent for any one month should not exceed RM44,000 and if there was a need to pay more than that amount IMSB's prior written approval had to be obtained. P10 was IMSB's letter to the respondent confirming that RM778,975 was the balance amount owing to the respondent under the subcontract and that IMSB had no objections to the respondent collecting that sum directly from the appellant. The appellant denied there was any assignment as contended by the respondent or that it had any contractual obligation to pay the respondent the amount claimed. The appellant also said the respondent did not plead whether the alleged assignment was legal or equitable. The High Court after full trial allowed the respondent's claim resulting in the instant appeal. The High Court found that P7 and P10 considered together with the surrounding circumstances showed the existence of a legal assignment which entitled the respondent to claim from the appellant the balance owing to it under the subcontract. Contrary to what the

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respondent had pleaded, the trial judge held that what was assigned was IMSB's right to receive payment from the appellant under the main contract.

Held, allowing the appeal with costs of RM50,000 and setting aside the decision of the High Court:

(1) The trial judge erred in law when she made a specific finding of legal assignment even though the respondent had neither pleaded it nor submitted to that effect. To compound the matter further, she found that the right that was assigned was IMSB's right to receive payment from the appellant under the main contract. Such finding was off-tangent with what the respondent had pleaded. The respondent had in fact pleaded that the chose in action that was assigned was IMSB's right to pay the respondent under the subcontract (see paras 12(b) & 21–22).

(2) The elements of a legal assignment had not been fulfilled. Serious uncertainties existed with regard to the nature of the assignment and the parties to it. The respondent claimed P7 and P10 constituted the necessary assignment but the language used in those exhibits did not give rise to an inference of an absolute assignment. Even if they did, two questions remained unanswered, namely, what had been assigned and to whom was it assigned. There was uncertainty about what was the chose in action in the purported assignment, uncertainty as to whom it was assigned, uncertainty about who were the parties to the assignment and to whom express notice of the assignment had to be given. There was no evidence as to whether express notice of the assignment had been given (see paras 24(b)–(d), 54 & 58).

(3) In the present case there was no written and executed assignment agreement at all. P7 and P10 were letters signed singularly by IMSB and no specific terms of any assignment were stated therein. Both exhibits did not show an absolute conveyance. P7 merely gave an option to the appellant to choose to pay the respondent directly for the cleaning services and if it chose to do so, the payment was subject to conditions. P10, on the other hand, gave the respondent an opportunity to make further arrangements for settlement of the outstanding sum. The scope of each exhibit was limited. IMSB's option to the appellant under P7, even if exercised, was subject to conditions and IMSB's agreement, under P10, to the respondent was limited to the outstanding sum only. Accordingly, P7 and P10 taken collectively or individually did not create any assignment at all. The parties knew there was no assignment and that was why a meeting on 17 December 2004 proposed that either IMSB formally assign the proceeds from the main contract to the respondent or that both the respondent and the appellant enter into a new contract. The minutes of that meeting, P8, were not considered at all by the trial judge (see paras 34, 41, 43–44 & 46–48).

(4) At all material times, there was no contract between the respondent and the appellant in connection with the provision of cleaning services at the dockyard. In Malaysia, the doctrine of privity of contract was confined to the rule that only a party to a contract could sue on it and only the parties to a contract had enforceable rights and obligations under the contract (see paras 59, 64 & 69).

[Bahasa Malaysia summary

Perayu telah melantik kontraktor ('IMSB') untuk memberi perkhidmatan pembersihan di limbungannya di Lumut, Perak. IMSB telah memberi subkontrak kerja itu kepada responden. Walaupun ia tiada hubungan kontraktual dengan perayu, responden telah menyaman perayu, di Mahkamah Tinggi untuk baki wang (RM778,975) yang perlu dibayar kepadanya untuk perkhidmatan pembersihan yang diberikan di limbungan itu. Guaman ini berasaskan hujah IMSB telah memberi tugas kepada perayu haknya untuk membayar responden bagi kerja yang telah dilakukan di bawah subkontrak itu. 'Assignment' itu adalah berdasarkan dua surat, P7 dan P10. P7 adalah surat IMSB kepada perayu yang menyatakan bahawa 'to facilitate improved commercial arrangements, it would be appreciated if regular monthly payments associated with the cleaning services could be made by PSC-ND on behalf of IMSB directly to DCSB (the respondent) ...' tertakluk kepada syarat, antara lain, bahawa bayaran kepada responden untuk mana-mana satu bulan tidak melebihi RM44,000 dan jika terdapat keperluan untuk membayar lebih daripada jumlah tersebut maka terlebih dahulu memperolehi IMSB hendaklah kelulusan bertulis. P10 adalah surat IMSB kepada responden yang mengesahkan bahawa RM778,975 adalah baki jumlah terhutang kepada responden di bawah subkontrak dan bahawa IMSB tiada bantahan kepada responden mengutip jumlah tersebut terus daripada perayu. Perayu menafikan terdapat apa-apa penyerahhakan sebagaimana dihujahkan oleh responden atau bahawa ia mempunyai apa-apa obligasi untuk membayar responden jumlah yang dituntut. Perayu juga mengatakan responden tidak merayu sama ada penyerahhakan yang dikatakan adalah sah atau saksama. Mahkamah Tinggi selepas perbicaraan penuh telah membenarkan tuntutan responden yang menyebabkan rayuan ini. Mahkamah Tinggi mendapati bahawa P7 dan P10 dipertimbangkan bersama dengan keadaan sekeliling menunjukkan penyerahhakan sah yang melayakkan responden untuk menuntut daripada perayu baki terhutang kepadanya di bawah subkontrak itu. Bertentangan dengan apa yang dipli oleh responden, hakim perbicaraan memutuskan bahawa apa yang ditugaskan adalah hak IMSB untuk menerima bayaran daripada perayu di bawah kontrak utama.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM50,000 dan mengetepikan keputusan Mahkamah Tinggi:

(1) Hakim perbicaraan terkhilaf dari segi undang-undang apabila beliau

membuat penemuan spesifik berhubung penyerahhakan sah meskipun responden tidak memplinya ataupun berhujah mengenainya. Untuk mengkompaun perkara itu lagi, beliau mendapati hak yang diberikan adalah hak IMSB untuk menerima bayaran daripada perayu di bawah kontrak utama. Penemuan sebegitu adalah menyimpang daripada apa yang dipli oleh responden. Responden sebenarnya telah mempli bahawa pilihan dalam tindakan yang diberikan adalah hak IMSB untuk membayar responden di bawah subkontrak itu (lihat perenggan 12(b) & 21–22).

(2) Elemen-elemen penyerahhakan sah tidak dipenuhi. Ketidakpastian serius wujud berhubung sifat penyerahhakan itu dan pihak-pihak kepadanya. Responden mendakwa P7 dan P10 membentuk penyerahhakan yang perlu tetapi bahasa yang digunakan dalam ekshibit-ekshibit tersebut tidak menimbulkan inferens tentang penyerahhakan mutlak. Wujud ketidakpastian tentang apa yang menjadi pilihan dalam tindakan dalam penyerahhakan yang dimaksudkan, ketidakpastian berhubung kepada siapa ia diserah hak, ketidakpastian tentang siapa pihak-pihak kepada penyerahhakan itu dan kepada siapa notis nyata penyerahhakan itu perlu diberikan. Tiada keterangan berhubung sama ada notis nyata penyerahhakan itu telah diberikan (lihat perenggan 24(b)–(d), 54 & 58).

(3) Dalam kes ini tiada perjanjian penyerahakkan bertulis dan yang disempurnakan langsung. P7 dan P10 adalah surat-surat yang ditandatangani oleh IMSB sahaja dan tiada terma spesifik tentang apa-apa penyerahhakan dinyatakan di dalamnya. Kedua-dua ekshibit tidak menunjukkan pemindahhakan mutlak. P7 hanya memberikan pilihan kepada perayu memilih untuk membayar kepada responden secara langsung untuk perkhidmatan pembersihan dan jika itu yang dipilihnya, bayaran itu adalah tertakluk kepada syarat-syarat. P10, sebaliknya, memberikan responden peluang untuk membuat urusan selanjutnya bagi penyelesaian jumlah tertunggak. Skop setiap ekshibit adalah terhad. Pilihan IMSB kepada perayu di bawah P7, walaupun dilaksanakan, adalah tertakluk kepada syarat dan perjanjian IMSB, di bawah P10, kepada responden adalah terhad kepada jumlah tertunggak sahaja. Sewajarnya, P7 dan P10 diambil secara kolektif atau berasingan tidak menjadi apa-apa penyerahhakan langsung. Pihak-pihak mengetahui tiada penyerahhakan dan kerana itu satu mesyuarat pada 17 Disember 2004 telah mencadangkan agar sama ada IMSB secara formal menyerah hak hasil daripada kontrak utama kepada responden atau agar kedua-dua responden dan perayu memasuki kontrak baru. Minit mesyuarat tersebut, P8, tidak diambil kira langsung oleh hakim perbicaraan (lihat perenggan 34, 41, 43–44 & 46–48).

(4) Pada setiap masa matan, tiada kontrak antara responden dan perayu

berkaitan peruntukan untuk perkhidmatan pembersihan di limbungan. Di Malaysia, doktrin priviti kontrak adalah terhad kepada peraturan bahawa hanya satu pihak kepada kontrak boleh menyamannya dan hanya pihak-pihak kepada kontrak mempunyai hak dan obligasi yang boleh dikuatkuasakan di bawah kontrak (lihat perenggan 59, 64 & 69).]

Notes

For cases on notice of assignment, see 3(2) *Mallal's Digest* (4th Ed,2013 Reissue) paras 3070–3071.

Cases referred to

Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor [1999] 2 MLJ 473, HC (refd)

AmBank (M) Bhd (formerly known as Arab-Malaysian Bank Bhd) v Luqman Kamil bin Mohd Don [2012] 3 MLJ 1; [2012] 3 CLJ 551, FC (refd)

Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd [2012] 5 MLJ 61; [2012] 4 CLJ 813, CA (refd)

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)

Badiaddin bin Mohd Mohidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Bruce v Odhams Press Ltd [1936] 1 KB 697, CA (refd)

Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL (refd)

Farrell v Secretary of State for Defence [1980] 1 All ER 166, HL (refd)

Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor [1988] 1 MLJ 269 (refd)

Gilbert Engineering Co Inc v Zainuddin bin Ahmad & Ors [2001] MLJU 568; [2001] 7 CLJ 489, HC (refd)

Greenwood Shopping Plaza Ltd v Beattie [1980] 2 SCR 228, SC (refd)

Hadmor Productions Ltd v Hamilton [1983] 1 AC 191, HL (refd)

Kepong Prospecting Ltd & Ors v Schmidt [1968] 1 MLJ 170; [1967] 2 PCC 465, PC (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 3 MTC 191, SC (refd)

Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals [2000] 3 MLJ 328, CA (refd)

Murphy v Bower (1866) IR 2 CL 506 (refd)

Narayanan v Kannamah [1993] 3 MLJ 730, HC (refd)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (refd)

Oversea Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd [1992] 2 MLJ 86, HC (refd)

RHB Bank Bhd v Dong Haeng Industries Sdn Bhd [2000] MLJU 657; [2001] 1 CLJ 417, HC (refd)
Rakyat Merchant Bankers Bhd v Abdul Rahim Aki & Ors [1997] 5 MLJ 201, HC (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Tweddle v Atkinson (1861) 1 B & S 393; (1861) 121 ER 762, QB (refd)
UMW Industries Sdn Bhd v Ah Fook [1996] 1 MLJ 365, FC (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206, FC (refd)
United Malayan Banking Corporation v Aluminex (M) Sdn Bhd & Anor [1993] 3 MLJ 587, SC (distd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Contracts Act 1950 s 2(d)

Appeal from: Civil Suit No S-22–326 of 2010 (High Court, Kuala Lumpur)

Aisya Abdul Rahman (Fahri Azzat with her) (Azzat & Izzat) for the appellant.
Mohamad Lusfi bin Yaakob (Amizaizul Izral bin Amran with him) (Iskandar Putra Izral) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] Dynaforce Corp Sdn Bhd ('the respondent') filed a civil suit before the High Court at Kuala Lumpur and claimed from Boustead Naval Shipyard Sdn Bhd ('the appellant') a sum of RM778,975 together with the interest and costs purportedly due to the respondent for cleaning services rendered at the appellant's dockyard in Lumut, Perak.

[2] After a full trial, the learned High Court judge gave judgment in favour of the respondent. Aggrieved, the appellant now appeals to this court.

THE FACTS

[3] The parties agreed that, at all material times, the respondent was not the appellant's contractor. Integrated Maker Sdn Bhd ('IMSB') appointed the respondent as a subcontractor by way of a letter of award dated 2 March 2002 (exh 'P3') as seen at pp 117–119 of the appeal record at Part 'C' of vol 3. For convenience, exh 'P3' was worded in this way and will now be reproduced:

SUBJECT: LETTER OF AWARD — SUPPLY OF LABOUR, SUPERVISION, EQUIPMENT AND CONSUMABLE FOR CLEANING SERVICES AT PSC-NAVAL DOCKYARD SDN. BHD. LUMUT, PERAK DARUL RIDZUAN

We refer to the above subject and hereby confirm our intention to award you the Contract to undertake the above Works subject to the following:

1.0 General Terms And Conditions

1.1 Scope Of Work.

1.1.1 To supply labour, supervision, equipment and consumable necessary for cleaning services and disposal of rubbish (hereinafter referred to as 'WORK') as per annexure of this Letter of Award. PSC-Naval Dockyard Sdn Bhd shall supply fresh water, electricity and compressed air.

1.1.2 To execute Quality Control inspection according to Yard Quality Standard.

1.1.3 To observe Yard's Work and Safety Regulation.

1.1.4 To maintain a proper housekeeping so as to keep the work site and surrounding area in good and tidy order.

1.1.5 To be solely responsible for any damage caused by wrong practice.

1.1.6 To be fully responsible for employing sufficient number of qualified workmen who are competent in their respective job to carry out the Work as required.

1.1.7 To provide Workmen Compensation Policy/SOCSO for all your employees/workers.

1.1.8 To provide Public Liability Insurance for a covered sum of RM100,000.00 for any personal injury and/any damage to equipment stationed at PSC-Naval Dockyard Sdn Bhd.

1.2 You are strictly prohibited from:

1.2.1 disposing off any scheduled wastes such as acid, toxic, chemicals, poisons, fuel and oil, paint material etc. from PSC-Naval Dockyard Sdn Bhd premises.

1.2.2 disposing off any rubbish/production waste into sea within PSC-Naval Dockyard Sdn Bhd premises.

1.2.3 collecting and disposing off any Scrap Metal from PSC-Naval Dockyard Sdn Bhd premises.

1.2.4 carrying out 'open burning' within Integrated PSC-Naval Dockyard Sdn Bhd premises.

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1.3 Price and Terms of Payment

1.3.1 The total price for cleaning services shall be fixed at RINGGIT MALAYSIA THIRTY SIX THOUSAND ONLY (RM36,000.00) per month. The price of disposal of rubbish from PSC-Naval Dockyard Sdn Bhd shall be fixed at RINGGIT MALAYSIA FIFTY ONLY (RM50.00) per ton per trip.

B

1.3.2 Payment shall only be made within thirty days (30 days) upon submission and approval of invoices.

C

1.4 Working Hours

1.4.1 Your working hours shall follow Integrated Maker Sdn Bhd normal working hours namely:

1.4.1.1 Monday to Friday - 08.00am to 05.00pm

D

1.4.1.2 Saturdays - 08.00am to 01.00pm

1.4.1.3 Rest Hour

(Mondays-Thursdays) - 01.00pm to 02.00pm

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(Fridays) - 12.45pm to 02.45pm

1.4.1.4 Sundays and Public Holidays - Off

1.4.2 You shall take instruction and be answerable to a duly appointed personnel from Health, Safety and Environment and Security Department (hereinafter referred to as 'HSE&S') for your day to day Work.

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1.4.3 In the event of any work required to be executed beyond the stipulated work scope or any Work in connection with this Letter of Award being required to be executed above and beyond the stipulated normal working hours, you shall be paid at the rates stated hereunder. The requirement for such shall be made in writing by the appointed authorized HSE&S personnel.

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1.4.3.1 Normal Hours RM5.25 per man per hour

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1.4.3.2 Overtime on week days RM7.90 per man per hour

1.4.3.3 Public Holidays and Sundays RM10.50 per man per hour

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1.4.4 You shall submit Work Completion Report and Attendance Sheet for overtime hours duly endorsed and signed by the authorised HSE&S along with invoices for payment.

2.0 Review and Termination of Services

2.1 Review of this Letter of Award shall be done from time to time or as wherever deemed necessary, subject to preliminary negotiations and approval by both parties.

2.2 Integrated Maker Sdn Bhd shall have the right to terminate this Letter of Award by giving fourteen (14) days notice in writing if you for any reason whatsoever, fail to perform Work as required or is persistently or flagrantly neglecting to carry out our obligation as stipulated in this Letter of Award.

With this Letter of Award, you are advised that there is now a binding contract between your goodselves and Integrated Maker Sdn Bhd.

Please confirm your agreement and acceptance of this Letter of Award by returning to us the duplicate copy of this letter duly signed and stamped where indicated, within seven (7) days of the date of this letter.

[4] It is also undisputed that the respondent had no contractual relationship whatsoever with the appellant in respect of the cleaning services.

[5] The appellant appointed IMSB as the main contractor by way of a letter of award dated 15 March 2001 ('the main contract') as seen at pp 114–116 of the appeal record at Part 'C' of vol 3 marked accordingly as exh 'P2'. Again, for convenience, exh 'P2' containing the main contract will now be reproduced:

SUBJECT: LETTER OF AWARD — SUPPLY OF LABOUR, SUPERVISION, EQUIPMENT AND CONSUMABLE FOR CLEANING SERVICES AT PSC-NAVAL DOCKYARD SDN. BHD. LUMUT, PERAK DARUL RIDZUAN

We refer to the above subject and to your tender submission reference ..., dated 18th January 2001, we hereby confirm our intention to award you the Contract to undertake the above Works subject to the following:

1.0 General Terms And Conditions

1.1 Scope Of Work.

1.1.1 To supply labour, supervision, equipment and consumable necessary for cleaning services and disposal of rubbish (hereinafter referred to as 'WORK') as per annexure of this Letter of Award. PSC-Naval Dockyard Sdn Bhd shall supply fresh water, electricity and compressed air.

1.1.2 To execute Quality Control inspection according to Yard Quality Standard.

1.1.3 To observe Yard's Work and Safety Regulation.

1.1.4 To maintain a proper housekeeping so as to keep the

work site and surrounding area in good and tidy order.

1.1.5 To be solely responsible for any damage caused by wrong practice.

1.1.6 To be fully responsible for employing sufficient number of qualified workmen who are competent in their respective job to carry out the Work as required.

1.1.7 To provide Workmen Compensation Policy/SOCSO for all your employees/workers.

1.1.8 To provide Public Liability Insurance for a covered sum of RM100,000.00 for any personal injury and/or any damage to equipment stationed at PSC-Naval Dockyard Sdn Bhd.

1.2 You are strictly prohibited from:

1.2.1 disposing off any scheduled wastes such as acid, toxic, chemicals, poisons, fuel and oil, paint material etc. from PSC-Naval Dockyard Sdn Bhd premises.

1.2.2 disposing off any rubbish/production waste into sea within PSC-Naval Dockyard Sdn Bhd premises.

1.2.3 collecting and disposing off any Scrap Metal from PSC-Naval Dockyard Sdn Bhd premises.

1.2.4 carrying out 'open burning' within PSC-Naval Dockyard Sdn Bhd premises.

1.3 Price and Terms of Payment

1.3.1 The total price for cleaning services shall be fixed at RINGGIT MALAYSIA FIFTY THOUSAND ONLY (RM50,000.00) per month. The price of disposal of rubbish from PSC-Naval Dockyard Sdn Bhd shall be fixed at RINGGIT MALAYSIA SEVENTY ONLY (RM70.00) per ton per trip.

1.3.2 Payment shall only be made within thirty days (30 days) upon submission and approval of invoices.

1.4 Working Hours

1.4.1 Your working hours shall follow PSC-Naval Dockyard Sdn Bhd normal working hours namely:

1.4.1.1 Mondays to Fridays - 08.00am to 05.00pm

1.4.1.2 Saturdays - 08.00am to 01.00pm

1.4.1.3 Rest Hour

(Mondays-Thursdays) - 01.00pm to 02.00pm

(Fridays) - 12.45pm to 02.45pm

1.4.1.4 Sundays and Public Holidays - Off

1.4.2 You shall take instruction and be answerable to a duly appointed personnel from Health, Safety and Environment and Security Department (hereinafter referred to as 'HSE&S') for your day to day Work.

1.4.3 In the event of any work required to be executed beyond the stipulated work scope or any Work in connection with this Letter of Award being required to be executed above and beyond the stipulated normal working hours, you shall be paid at the rates stated hereunder. The requirement for such shall be made in writing by the appointed authorized HSE&S personnel.

1.4.3.1 Normal Hours RM5.25 per man per hour

1.4.3.2 Overtime on week days RM7.90 per man per hour

1.4.3.3 Public Holidays and Sundays RM10.50 per man per hour

1.4.4 You shall submit Work Completion Report and Attendance Sheet for overtime hours duly endorsed and signed by the authorised HSE&S along with invoices for payment.

2.0 Review and Termination of Services

2.1 Review of this Letter of Award shall be done from time to time or as whenever deemed necessary, subject to preliminary negotiations and approval by both parties.

2.2 PSC-Naval Dockyard Sdn Bhd shall have the right to terminate this Letter of Award by giving fourteen (14) days notice in writing if you for any reason whatsoever, fail to perform Work as required or is persistently or flagrantly neglecting to carry out your obligation as stipulated in this Letter of Award.

With this Letter of Award, you are advised that there is now a binding contract between your goodselves and PSC-Naval Dockyard Sdn Bhd.

Please confirm your agreement and acceptance of this Letter of Award by returning to us the duplicate copy of this letter duly signed and stamped where indicated, within seven (7) days of the date of this letter.

[6] In suing the appellant, the respondent claimed that IMSB had *assigned* its rights under the main contract to the respondent on the strength of two letters, namely:

(a) a letter of IMSB addressed to the appellant dated 30 November 2004 marked as exh 'P7' as seen at pp 123–124 of the appeal record at Part 'C' of Vol 3; and

(b) a letter from IMSB to the respondent dated 5 July 2005 marked as exh 'P10' as seen at p 133 of the appeal record at Part 'C' of Vol 3.

[7] Exhibit 'P7', for the sake of convenience, is now reproduced:

STANDING LETTER OF INSTRUCTION — PAYMENT TO CLEANING SERVICES. SUB-CONTRACTOR.

References:

A. SC-ND Letter of Award PSC-ND/4900/CON-(0150) dated 15 March 2001.

B. IMSB Letter of Award IMSB/DCSB/01/0203-LA dated 2 March 2002.

Integrated Maker Sdn Bhd (IMSB) is contracted to PSC-Naval Dockyard Sdn Bhd (PSC-ND) vide Reference A for the supply of labour, supervision, equipment and cleaning services at PSC-ND Lumut. To execute the required works, IMSB has engaged Dynaforce Corporation Sdn Bhd (DCSB), as its subcontractor vide Reference B.

To facilitate improved commercial arrangements it would be appreciated if regular monthly payments associated with the cleaning services could be made by PSC-ND on behalf of IMSB directly to DCSB subject to the following conditions:

(a) Payment made to DCSB by PSCND, on behalf of IMSB, should not exceed RM44,000.00 in any calendar month.

(b) Should a requirement exist whereby a total calendar monthly payment in excess of RM44,000.00 is proposed, then PSCND should obtain prior written approval from IMSB for the payment to be effected.

(c) All payments shall be offset against IMSB valid invoices.

(d) Payments to DCSB shall be made to the following account:

Name of Company:	Dynaforce Corporation Sdn Bhd
Name of Bank:	RHB Bank, Sitiawan
Account No:	208221200007825

Your assistance in this matter is greatly appreciated.

Yours sincerely

[8] For convenience, we will now reproduce exh 'P10':

Dear Sirs,

CLEANING SERVICES CONTRACT (Without Prejudice)

Assignment of Payment

We refer to the above mentioned matter.

Integrated Maker Sdn Bhd (IMSB) hereby agree and have no objections for Dynaforce Corporation Sdn Bhd (DCSB) to make the arrangement directly with PSC to collect the remaining outstanding payment up to a total amount of RM778,975.00.

The above said figure representing the total amount owing to DCSB by IMSB (by) virtue of being the sub-contractor to IMSB undertaking the cleaning services at PSC-Naval Dockyard Lumut.

As such, any payments made to DCSB up to the above said amount shall be deducted accordingly from IMSB balance outstanding with DCSB.

Thank you.

[9] Simply put, the respondent sued the appellant as an assignee of IMSB based on exhs 'P7' and 'P10' and succeeded before the High Court at Kuala Lumpur.

ANALYSIS

[10] It was the appellant's defence, on the balance of probabilities, that there was no such assignment. The respondent argued that by virtue of exhs 'P7' and 'P10', IMSB had assigned their right to pay directly to the respondent. The respondent's statement of claim in regard to the issue of assignment can be seen at paras 5, 8, and 10 as seen at p 32 of the appeal record at Part 'A' of Vol 1, and, for convenience, these paragraphs will now be reproduced:

5. Pada 30.11.2004, melalui satu surat IMSB kepada defendan, IMSB telah mengarahkan defendan untuk membayar terus kepada plaintif baki jumlah tertunggak bagi kontrak pembersihan.

8. Pada 5.7.2005, IMSB telah bersetuju untuk menyerahkan hak pembayaran dari defendan kepada plaintif untuk tunggakan pembayaran sejumlah RM778,975.00.

10. Plaintif menyatakan bahawa IMSB telah menyerahkan hak dan memberi kuasa kepada defendan untuk membuat bayaran terus kepada plaintif. Kerja-kerja pembersihan telah dilaksanakan di premis defendan dan kerja-kerja tersebut adalah untuk faedah defendan. Defendan sepatutnya membuat bayaran kepada plaintif seperti yang diminta oleh IMSB.

[11] The stand of the appellant was rather simple. That nowhere in the respondent's pleadings was it pleaded that such assignment was legal or equitable. It was submitted on behalf of the appellant that the act of paying cannot reasonably be construed or deemed as a legal chose in action. Consequently, it was argued that for these reasons, the respondent cannot legitimately claim the outstanding sums from the appellant.

[12] As alluded to earlier after a full trial, on 3 October 2012, the learned High Court judge allowed the respondent's claim with costs. The written grounds of judgment of Her Ladyship showed the following findings which she made:

(a) Based on the two letters in exhs 'P7' and 'P10' as well as the surrounding circumstances, Her Ladyship found that there was a legal assignment which entitled the respondent to claim for the outstanding sums under the subcontract against the appellant. Towards this end, in her written grounds of judgment at pp 23–24 of the appeal record at Part 'A' of Vol 1, Her Ladyship had this to say:

> Oleh yang demikian Mahkamah ini berpuashati bahawa plaintif telah membuktikan perkara-perkara seperti berikut:
>
> (1) terdapat satu penyerahan hak dari IMSB kepada plaintif yang mutlak dan sah di sisi undang-undang;
>
> (2) plaintif berhak menuntut daripada defendan di Mahkamah atas nama plaintif untuk jumlah hutang yang tertunggak; dan
>
> (3) jumlah sebanyak RM778,975.00 merupakan jumlah yang terhutang oleh defendan untuk kerja-kerja pembersihan yang telah dilakukan oleh plaintif.

(b) Her Ladyship even went to the extent of 'correcting' the respondent's pleadings and found that what was assigned was IMSB's right to receive payment from the appellant under the main contract. Such finding was off tangent with what the respondent had pleaded. This can be seen in the written grounds of judgment at p 11 of the appeal record at Part 'A' of Vol 1 which will now be reproduced:

> ... surat lantikan bertarikh 15 Mac 2001 (P2) ('surat lantikan tersebut') kepada plaintif dan bahawa defendan berhutang kepada plaintif sejumlah RM778,975.00.

[13] Since time immemorial, pleadings play an important role in civil litigation. What is pleaded will no doubt serve to define the parameters of the case. The issues of facts and questions of law will be identified and they in turn will be adjudicated between the parties during trial. It gives to a large extent a distinct and clear notice of the case that will be adjudicated and this will prevent either party from being taken by surprise during trial. The court too will benefit from the pleaded case and could easily identify the issues for determination.

[14] The importance of pleadings was emphasised by Lord Edmund-Davies in *Farrell v Secretary of State for Defence* [1980] 1 All ER 166 (HL). There, at p 173, His Lordship had this to say:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there had been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purposes is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

[15] It is also instructive to refer to the judgment of Lord Diplock in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 (HL), particularly at p 233. There, His Lordship succinctly said:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.

[16] The trial of the suit must be confined to the pleadings and the court is not entitled to decide the suit on a matter which is not pleaded. In short, the parties are bound by their pleadings (*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154; *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615; *S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 3 MLJ 730; and *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22).

[17] To formulate and advance a complete cause of action, the material facts must be pleaded (*Bruce v Odhams Press Ltd* [1936] 1 KB 697; *RHB Bank Bhd v Dong Haeng Industries Sdn Bhd* [2000] MLJU 657; [2001] 1 CLJ 417 at p 678 (MLJ); p 438 (CLJ); *Gilbert Engineering Co Inc v Zainuddin bin Ahmad & Ors* [2001] MLJU 568; [2001] 7 CLJ 489; and *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (FC)).

[18] The necessity of pleading all the material facts will be appreciated when one considers the principle that the parties are barred from adducing evidence of unpleaded facts during the trial (*Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd*); *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 (SC); and *Lembaga Pemegang Amanah Yayasan Sabah & Anor v Datuk Syed Kechik bin Syed Mohamed & Anor and other appeals* [2000] 3 MLJ 328 (CA)).

[19] The writ and the statement of claim will be rendered defective when fundamental and material facts are omitted (*Rakyat Merchant Bankers Bhd v Abdul Rahim Aki & Ors* [1997] 5 MLJ 201). Such grave omissions of this nature cannot be corrected by affidavit evidence (*Adib bin Mokhtar & Ors v Jason Chan Chee Khong & Anor* [1999] 2 MLJ 473).

[20] It is trite and it is cast in stone that the courts must confine itself to the four corners of the pleadings and have no powers to create a claim or defence for the litigants (*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 3 MTC 191 (SC); *AmBank (M) Bhd (formerly known as Arab-Malaysian Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 CLJ 551 (FC); and *Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd* [2012] 5 MLJ 61; [2012] 4 CLJ 813 (CA)).

[21] Guided by the legal principles on pleadings, we hold that the learned High Court judge erred in law when she made a specific finding of legal assignment even though the respondent neither pleaded nor submitted on them.

[22] To compound the matter further, the learned High Court judge asserted that the right that was assigned was IMSB's right to receive payment under the main contract from the appellant. In sharp contrast, the respondent pleaded that the chose in action is IMSB's right to pay the respondent under the subcontract.

[23] A perusal of the written grounds of judgment of the learned High Court judge showed that Her Ladyship had misapplied the law on assignment. We noted, with respect, that Her Ladyship also failed to judicially appreciate the factual matrix of the case when she found that there was a valid legal assignment which entitled the respondent to claim against the appellant.

[24] We found that the learned High Court judge's findings erroneous for the following salient reasons:

(a) the principles of construction of assignment documents as laid down by the Supreme Court in the case of *United Malayan Banking Corporation v Aluminex (M) Sdn Bhd & Anor* [1993] 3 MLJ 587 were misapplied;

(b) the respondent claimed that exhs 'P7' and 'P10' constituted the necessary assignment but the language employed in those exhibits did not give rise to an inference of an absolute assignment and even if they do, two questions remain unanswered, namely:

(i) what had been assigned? and

(ii) to whom it was assigned to?

(c) the uncertainty in the chose in action of the purported assignment makes it uncertain as to the parties in the assignment and to whom the express notice must be given to; and

(d) be that as it may, no evidence was led as to whether the express notice of the assignment had been given.

[25] Proceeding ahead, we will now elaborate further under different sub headings.

Principles of construction of assignment documents

[26] Section 4(3) of the Civil Law Act 1956 defines the meaning of absolute assignment. It is worded as follows:

> 4(3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

[27] The Federal Court case of *UMW Industries Sdn Bhd v Ah Fook* [1996] 1 MLJ 365 stipulates that to constitute an absolute legal assignment, a few requirements must be fulfilled. Chong Siew Fai CJ (Sabah and Sarawak) delivering the judgment of the court aptly said at pp 370–371 of the report:

> We have considered s 4(3) of the Civil Law Act 1956 referred to by counsel for both sides. The subsection lays down conditions for effecting absolute legal assignments. It is clear that the conditions are:
>
> (1) that the assignment must be in writing under the hand of the assignor;
>
> (2) that the assignment must be absolute and not by way of charge only; and
>
> (3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.
>
> If the assignment fulfills all the above conditions, it would transfer absolutely the chose in action and the right to sue upon it in the assignee's own name.

[28] Continuing further at p 371, His Lordship had this to say:

> As to the assignment in writing, no particular form is necessary but it must be absolute, ie one that purports to pass the entire interest of the assignor in the chose in action. Thus in *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 (CA),

Jenkins LJ dealing with s 136(1) of the Law of Property Act 1925 (English) the equivalent of which in our law is s 4(3) of the Civil Law Act 1956, said: (at p 299 F–H)

> It is, no doubt, true that s 136(1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The subsection does, however, clearly postulate that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question.

[29] The law as enunciated in *Ah Fook*'s case by the Federal Court may be stated as follows. Although there is no particular form that is required to be followed in establishing an assignment in writing, yet the language used in the writing that gives rise to an assignment must be absolute in that it will pass the entire interest of the assignor in the chose in action.

[30] Now, in the present appeal, the learned High Court judge considered exhs 'P7' and 'P10' together with the oral evidence of the witnesses as well as the surrounding circumstances in order to arrive at her decision. The approach adopted by Her Ladyship followed closely the guidelines as set out by the Supreme Court in the case of *United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor* where Edgar Joseph Jr SCJ delivering the judgment of the court had this to say at p 602 of the report:

> In our view, the assignment, like any other document, must be construed reasonably; it must be construed not only by the words used but also with due regard to the surrounding circumstances, (see s 92(f) of the Evidence Act 1950), not forgetting the other contemporary documents.

That was the approach adopted by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989; [1976] 3 All ER 570, when he said (at p 995):

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

And, he continued (at p 997): '.... what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were'.

[31] Likewise, the learned High Court judge in her written grounds of judgment at p 14 of the appeal record at Part 'A' of Vol 1 had this to say:

Dalam kes di hadapan Mahkamah, Mahkamah mendapati berdasarkan keterangan dokumentari terutamanya P7 dan P10, keterangan lisan daripada saksi-saksi plaintif (PW1, PW2 dan PW3) dan juga melalui pemeriksaan balas saksi defendan (DW1) dan keadaan sekeliling bahawa plaintif mempunyai hak untuk membawa tindakan terhadap defendan dalam nama plaintif kerana IMSB telah menyerahakkan hak mereka di dalam surat lantikan tersebut dengan sempurna kepada plaintif untuk membolehkan plaintif membawa tuntutan terhadap defendan.

[32] Her Ladyship continued at p 22 of the appeal record at Part 'A' of Vol 1 wherein she expressed her opinion in this way:

... adalah menjadi pendapat Mahkamah ini bahawa kes yang paling sesuai untuk diikuti dalam kes ini berdasarkan fakta kes ini ialah kes *United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd* [1993] 3 MLJ 587 di mana Mahkamah Agung telah memutuskan bahawa keadaan sekeliling boleh juga diambilkira oleh Mahkamah semasa Mahkamah menentukan isu samada terdapat penyerahan hak yang sempurna dari IMSB kepada plaintif untuk membolehkan plaintif membawa tuntutan dalam kes ini terhadap defendan.

[33] But the facts in *Aluminex* are different from the present appeal at hand. In that case, the assignment was created by way of an executed loan cum assignment agreement and it was registered as a charge in favour of its assignee. At p 602, Edgar Joseph Jr SCJ had this to say in *Aluminex*:

We have already noted, when referring to the main provisions of the assignment styled as a loan cum assignment agreement, that it was specifically provided, inter alia, that the assignment was to remain in full force and effect until the facility in respect of the purchase of the glass had been fully paid. Counsel for UAB has sought to draw a distinction between 'the facility' and 'the purchase price of the glass', but this overlooks the point that the facility was to finance the purchase of the glass and the judge had so found on the facts. Without that facility, Aluminex would not have been able to fulfil its obligations under the sub contract and without the protection of a purchase money security interest, UMBC would not have advanced the facility at all. Undoubtedly, UMBC required the execution of the assignment by Aluminex so as to create a charge, since upon delivery of the glass to Aluminex, the latter could be the legal owner of it and so could reasonably by expected, in due course, to be entitled to the progress payments due to it upon fulfilling its obligations under the sub contract.

[34] Here, in the present appeal at hand, in sharp contrast, there is no written and executed assignment agreement at all. Here, exhs 'P7' and 'P10' as reproduced earlier are letters signed singularly under the hand of IMSB and no specific terms of any assignment are stated therein.

[35] On the facts, *Aluminex* can readily be distinguished from the present appeal. There, the issue was whether the loan cum assignment agreement was

absolute and gave United Malayan Banking Corp Bhd priority to a competing debenture. The Supreme Court, in determining this issue, considered the circumstances surrounding the execution of the agreement.

[36] Whereas here, the issue is centred on the question pertaining to exhs 'P7' and 'P10' and whether those exhs can be deemed to be an assignment.

[37] Having compared and contrasted the facts of *Aluminex* with the present appeal at hand, it is apparent that reliance on *Aluminex* by the High Court judge was flawed and misplaced. It cannot be denied that the issue of whether the surrounding circumstances can be taken into account in determining whether the assignment is absolute or by way of a charge is an approach which is purely secondary in nature.

The language employed in exhibits 'P7' and 'P10' do not demonstrate an absolute assignment

[38] The High Court, in construing exhs 'P7' and 'P10', applied the test laid down in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 (FC) in ascertaining whether an assignment was an absolute one. But, *Nouvau Mont Dor* would only be applicable if there is an agreement creating the assignment and the only issue left to decide is whether that assignment is absolute. Just like *Aluminex*, there was also an expressly written and executed loan cum assignment agreement in *Nouvau Mont Dor*. Whereas in the present appeal, there is a complete absence of such agreement.

[39] We have perused through exhs 'P7' and 'P10' and we found that these exhibits do not give rise to an assignment and an assignment cannot be inferred from it. These exhibits do not show the passing of IMSB's right to receive payment from the appellant absolutely under the main contract.

[40] The relevant part of exh 'P7' which was reproduced earlier in this judgment will now be reproduced, once again. It reads as follows:

> To facilitate improved commercial arrangements, it would be appreciated if regular monthly payments associated with the cleaning services could be made to PSC-ND on behalf of IMSB directly to DCSB subject to the following conditions.

[41] This passage gives rise to the following implications. Firstly, that the appellant may choose to pay the respondent directly for the cleaning services. Secondly, even if the appellant chooses to do so, the payment by the appellant is still conditional.

[42] We now take a look at exh 'P10' which was reproduced earlier in this judgment. It states to the following effect: that IMSB would agree and would not object if the respondent arranges with the appellant directly for payment of the outstanding sum. A

[43] Thus, it is perfectly in order to say that both exhs 'P7' and 'P10' do not show an absolute conveyance. Exhibit 'P7' gives an option to the appellant while exh 'P10' gives the respondent an opportunity to make further arrangements for settlement of the outstanding sum. B

[44] To compound the matter further, the scope of each exhibit is limited. We say that IMSB's option to the appellant, even if it is exercised, is still subject to conditions. And IMSB's agreement to the respondent is limited to the outstanding sum only. C

[45] Be that as it may, it is interesting to note that the two exhibits — referring to exhs 'P7' and 'P10', do not disclose which of the two rights that the High Court has found or that the respondent has pleaded, has been assigned. And if it has been assigned, to whom has it been assigned to. D

[46] For these brief reasons, it is our judgment that exhs 'P7' and 'P10' taken collectively or individually do not create any assignment at all. These exhibits are far from perfect. E

[47] It is germane to mention that the parties knew that there was no assignment. It is for this reason that a meeting was held on 17 December 2004. In that meeting, Ismail Mokhtar bin Othman ('DW1') proposed that either IMSB formally assign the proceeds from the main contract to the respondent or both the respondent and the appellant enter into a new contract. The minutes of that meeting can be seen at pp 126–129 of the appeal record at Part 'C' of Vol 3 and it is marked as exh 'P8'. F G

[48] With respect, the learned High Court judge did not consider exh 'P8' at all. H

[49] We agreed with the submission of learned counsel for the appellant who submitted that the learned High Court judge overlooked the floodgates that will be opened if letters like exhs 'P7' and 'P10' are deemed sufficient to constitute as legal assignments. I

No express notice of the assignment

[50] Even if one were to construe that an assignment can be ascertained from exhs 'P7' and 'P10', yet the requirement of an express notice of the assignment has not been fulfilled. No evidence was led by the respondent to show that the required express notice was given.

[51] Learned counsel for the respondent submitted before the High Court that notice can be deemed to have been given to the appellant for the simple reason that there is evidence that copies of exhs 'P7', 'P9' and 'P10' had been given to the appellant. Exhibit 'P9' is a letter dated 28 June 2005 enclosing the statement of account for the cleaning services and it can be seen at pp 130–132 of the appeal record at Part 'C' of Vol 3.

[52] It was rightly submitted by learned counsel for the appellant that even if copies of exhs 'P7', 'P9' and 'P10' were given to the appellant, they were insufficient.

[53] It must be borne in mind that no express assignments had been created by exhs 'P7' and 'P10'. The same conclusion would equally apply to exh 'P9'.

[54] There is uncertainty in the chose of action and there is also uncertainty as to whom it is assigned to. That being the case, the person who is liable to IMSB and to whom the notice is due are also uncertain.

[55] The High Court held that if the chose in action constitutes IMSB's right to receive payment under the main contract, then IMSB's express notice is specifically due to the appellant. But, if the chose in action constitutes IMSB's 'right to pay the respondent' under the IMSB's subcontract as pleaded by the respondent, then IMSB's express notice is specifically due to the respondent.

[56] It is pertinent to note that both exhs 'P7' and 'P9' were addressed to the appellant while exh 'P10' was addressed to the respondent. It must be mentioned that the High Court merely agreed to the respondent's submission without providing further explanation as reflected at lines 1–3 of p 18 of the appeal record at Part 'A' of Vol 1. That being the case, the following crucial questions remain unanswered:

(a) which of these three exhibits constitute that express notice?

(b) in which circumstance do these three exhibits operate as a notice? and

(c) do they all collectively constitute that notice?

[57] However, it is the stand taken by the appellant that none of these crucial questions constitute that express notice. We agreed with the appellant that there are far too many variables and uncertainties, and the sweeping submissions of the respondent to prop up the scenarios of notice cannot stand curial scrutiny and should not be sustained.

[58] In our judgment, the elements of legal assignment have not been fulfilled. Serious uncertainties existed in regard to the nature of the assignment and the parties to the assignment. The sharp contrast between the respondent's pleaded case and the High Court judgment as alluded to earlier cannot be ignored.

[59] In regard to the issue of privity of contract which was raised in the memorandum of appeal, we have this to say. At all material times, there was no contract between the respondent and the appellant for providing cleaning services and for supplying manpower and equipment at the appellant's dockyard. This was consistently admitted by the respondent's witnesses.

[60] Mustafa bin Ahmad ('PW2') admitted in his witness statement that IMSB is the appellant's main contractor while the respondent is IMSB's subcontractor. That being the case, IMSB would pay the respondent for the respondent's services once IMSB receive payment from the appellant.

[61] Zulkifli bin Hamid ('PW1') and Khamdi bin Khalip @ Leman ('PW3') admitted under cross-examination that there was no contract executed between the respondent and the appellant even after DW1 proposed that a fresh contract be entered directly between the appellant and the respondent during the meeting between the representatives of the parties on 17 December 2004 when the issue of outstanding payment came to light.

[62] DW1's evidence in regard to the absence of any contract between the respondent and the appellant has always been consistent, even during cross-examination.

[63] The law is clear. A person who is not a party to a contract has no right to sue on a contract (see *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170 (PC); [1967] 2 PCC 465 (PC); and s 2(d) of the Contracts Act 1950; *Oversea Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd* [1992] 2 MLJ 86 (HC); and *Badiaddin bin Mohd Mohidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 (FC)).

[64] Section 2(d) of the Contracts Act 1950 provides that consideration for a promise may move from the promisee or any other party. It cannot be denied that the scope of the section is wider than the English rule that requires

consideration to move from the promisee (see the speech of Lord Wilberforce in *Kepong Prospecting Ltd & Ors v Schmidt* at p 174 of the MLJ reporting). It is a correct proposition of law to say that in Malaysia, the doctrine of privity is confined to the rule that only a party to a contract may sue on it.

[65] The case of *Tweddle v Atkinson* (1861) 1 B & S 393, at p 397; (1861) 121 ER 762, at pp 763–764, molded the doctrine of privity in its present form. The facts in that case may be stated thus. William Tweddle was engaged to Guy's daughter. To provide for the young couple after their marriage, Guy and Tweddle's father by the name of John, agreed between them that each would pay William Tweddle £100. It was further agreed that William Tweddle could sue for these sums. When he died, Guy had still not paid the promised sum and William Tweddle sued the executor, Atkinson, for the money.

[66] William Tweddle's action failed. He was described as 'a stranger to the consideration' and, not having paid for the promise, could not enforce it. The fact that Guy had made no promise to him would also have debarred him from recovery on the grounds of privity of contract. Wightman J had this to say:

> Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. ... On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

[67] After *Tweddle v Atkinson*, the doctrine of privity was firmly established as part and parcel of the English common law in the case of *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL). There, Viscount Haldane LC aptly said at p 853:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.

[68] Mohamed Dzaiddin J (later the Chief Justice) rightly said in *Fima Palmbulk Services Sdn Bhd v Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269 at p 271 that, 'It is clear that the English doctrine of privity of contract applies to our law of contract'.

[69] The doctrine of privity of contract is here to stay. In *Murphy v Bower* (1866) IR 2 CL 506, the court categorically stated that, 'no stranger to the consideration can take advantage of a contract, although made for his benefit'. Bluntly put, only the parties to the contract have enforceable rights and obligations under the contract.

[70] As an established principle of contract law, the common law doctrine of privity of contract stands for the simple proposition that, 'no one but the parties to a contract can be bound by it or entitled under it' (*Greenwood Shopping Plaza Ltd v Beattie* [1980] 2 SCR 228, at p 229).

[71] For the varied reasons alluded to in this judgment, we unanimously allowed the appeal of the appellant with costs of RM50,000 here and below. We set aside the decision of the High Court. Deposit refunded to the appellant.

Appeal allowed with costs of RM50,000 and decision of the High Court set aside.

Reported by Ashok Kumar